Supreme Court, U.S.
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No. 10-83

IN THE
Supreme Court of the United States

GARY E. PEEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The government's opposition reads both the record below and this Court's precedents too narrowly. First, the government urges this Court to deny review of Petitioner's constitutional claims because this case is in an interlocutory posture. But although the court of appeals reversed in part and remanded for further proceedings, Petitioner seeks to raise important and clear-cut issues of law that otherwise would qualify as a basis for certiorari and that are unrelated to the issues the lower courts will consider on remand. Therefore, the interlocutory status of this case should not preclude review.

Second, the government asserts that this Court should deny review because Petitioner failed to preserve his constitutional claims below. But in both the district court and the court of appeals, Petitioner contended, as he does now, that he could not be convicted of the child pornography offenses with which he was charged because the subject of his photographs was not a child under Illinois law at the time the pictures were taken. Moreover, the court of appeals passed on the question presented in this case, stating unequivocally that under this Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), only the presence of sexual abuse can justify, as a constitutional matter, the prohibition of non-obscene child pornography. That is an issue of exceptional national importance. Accordingly, this Court should exercise its discretion to review Petitioner's claims.

Finally, the government argues that this case does not squarely present the issues Petitioner seeks to raise. To the contrary, this case involves a direct conflict with this Court's decision in *Free Speech Coalition*, as Petitioner was convicted of possessing non-obscene pornography even though no child (and therefore no child sex abuse) was involved in the creation of the images. In addition, this case raises serious *Ex Post Facto* Clause concerns that, at the very least, warrant holding the petition for certiorari pending this Court's ruling on the petition in a similar case, *United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *petition for cert. pending*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2009) (No. 09-940).

Accordingly, this Court should grant the petition for certiorari, or at a minimum, hold the petition pending its ruling in *Juvenile Male*.

I. The Interlocutory Nature of This Case Should Not Preclude Review.

The government asserts that this Court's review of Petitioner's constitutional claims is not warranted at this time because the case is in an interlocutory posture. Br. Opp. 9-10. It points out that the court of appeals reversed in part and remanded with directions that the district court vacate either Petitioner's bankruptcy fraud conviction or obstruction of justice conviction and resentence Petitioner in accordance with its opinion. *Id.* (citing Pet. App. 22a)).

The government does not dispute, nor could it, that this Court has jurisdiction to review an interlocutory judgment of a court of appeals under 28

U.S.C. § 1254(1). Instead, it argues that this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." Br. Opp. 9 (alteration in original; quoting *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., regarding denial of certiorari)). But the government fails to acknowledge that "[w]here there is an important and clear-cut issue of law which is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari, interlocutory status need not preclude review." *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari where lower court denied motion to suppress and criminal trial had not yet occurred). This is such a case.

Whether Petitioner's convictions for possession of child pornography violate the First Amendment and the *Ex Post Facto* Clause present "important" and "clear-cut" issues of law that "would otherwise qualify as a basis for certiorari," as Petitioner explains in his petition and in this reply brief. Pet. 7-17; *see infra* at 5-9. These issues are unrelated to the matters that the district court must consider on remand, and nothing that the lower courts do on remand will affect them. In contrast, if this Court were to find Petitioner's child pornography convictions unconstitutional, that would moot his resentencing on those charges, and likely also would change the calculation of his sentence on any remaining counts. For that reason, the district court ordered that proceedings on remand be stayed until

this Court rules on this petition. There is no reason to defer review of Petitioner's constitutional claims.

II. Petitioner Adequately Preserved the Issues That He Seeks to Raise.

The government next argues that the petition should be denied because Petitioner failed to raise the First Amendment and *Ex Post Facto* Clause claims before either the district court or the court of appeals. Br. Opp. 10-11. But in the district court, Petitioner referred repeatedly to the fact that his then-sister-in-law was above the age of consent at the time the photographs at issue were taken, and asserted again and again that both his relationship with her, and the pictures that he took, were legal in 1974 and for many years afterwards. Br. for Appellant at 37 (7th Cir. Sept. 11, 2009). Indeed, Petitioner even prevailed on the district court to take "judicial notice of the fact that in 1973 and 1974, the age of consent for sexual activity was 16." *Id.* Before the court of appeals, Petitioner again asserted that the district court erred in denying his motion for judgment of acquittal on the child pornography because his then-sister-in-law was not a child at the time the photographs were taken. *Id.* at 33-38. When the court of appeals rejected this argument, Petitioner filed a combined petition for rehearing and rehearing en banc arguing that the court's decision conflicted with *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Petition for Reh'g at 10-11 (7th Cir. Feb. 26, 2010). That is precisely the issue that Petitioner seeks to raise before this Court.

Moreover, the court of appeals addressed the substantive First Amendment issue presented in this petition. Specifically, it stated that *Free Speech Coalition* held that "the production of non-obscene pornography in which no child was involved cannot constitutionally be prohibited, because there is no sexual abuse in such a case, and only the presence of that abuse . . . justifies the suppression of pornography that does not cross the line to obscenity." Pet. App. 13a. Thus, even if the court of appeals was correct that Petitioner did "not argue that because the photos of his sister-in-law were not illegal when he took them, they could not constitute sexual abuse of a minor," Pet. App. 13a-14a, it nonetheless passed on the constitutional issue that Petitioner seeks to raise. This Court's traditional rule "precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). As this Court explicitly has recognized, "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon." *Id.* Therefore, this Court should review the important constitutional issues here.

III. This Case Squarely Presents the Issues That Petitioner Seeks to Raise.

There is no merit to the government's contention that this case does not squarely present the First Amendment and *Ex Post Facto* Clause issues that Petitioner seeks to raise. The court of appeals' decision clearly conflicts with this Court's decision in *Ashcroft v. Free Speech Coalition*, 535

U.S. 234 (2002), and raises significant *Ex Post Facto* Clause concerns that warrant this Court's review.

1. The government asserts that there is no conflict between the court of appeals' decision and *Free Speech Coalition* because that case "did not . . . hold that the sexual exploitation of a child occurs only when the law in effect at the time of production criminalizes the underlying act." Br. Opp. 14. That argument is untenable.

First, *Free Speech Coalition* makes clear that only the governmental interest in preventing child sex abuse justifies banning non-obscene sexually explicit images of young people. In that case, this Court noted that *New York v. Ferber*, 458 U.S. 747 (1982), upheld a prohibition on the production, distribution, and sale of child pornography "because these acts were 'intrinsically related' to the sexual abuse of children." *Free Speech Coalition*, 535 U.S. at 249. Subsequently, it observed, *Osborne v. Ohio*, 495 U.S. 103 (1990), held that "these same interests justified a ban on the possession of pornography produced by using children," a ruling "anchored . . . in . . . concern for the participants, those whom [this Court] called the 'victims of child pornography.'" *Free Speech Coalition*, 535 U.S. at 250. Tellingly, this Court emphasized that *Osborne* "did not suggest that, absent this concern, other governmental interests would suffice." *Id.* And applying these principles to the Child Pornography Prevention Act of 1996 ("CPPA"), Pub. L. No. 104-208, Div. A, Tit. I, § 101(a), 110 Stat. 3009-26, this Court concluded that the CPPA banned speech that was not "'intrinsically related' to the sexual abuse of children," and

therefore was unconstitutional. *Free Speech Coalition*, 535 U.S. at 250, 256.

Second, in characterizing the conduct the prevention of which would justify a ban on non-obscene child pornography, *Free Speech Coalition* speaks repeatedly in terms of crimes. For example, in discussing *Ferber*, this Court pointed out that under either of that case's two rationales for prohibiting the production, distribution, and sale of child pornography, "the speech had what the Court in effect held was a proximate link to the *crime* from which it came." *Id.* at 250 (emphasis added). Analyzing the CPPA, this Court observed that it "prohibits speech that records no *crime* and creates no victims by its production," and that although the government asserted that virtual child pornography could lead to actual child abuse, "the causal link [was] contingent and indirect," as "[t]he harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent *criminal acts*." *Id.* (emphases added). Thus, the government's suggestion that the prevention of *noncriminal* conduct can justify banning non-obscene child pornography finds no support in *Free Speech Coalition*.

In this case, it is undisputed that Petitioner's then-sister-in-law was sixteen years old, and therefore above the age of consent in Illinois, at the time that the photographs at issue were taken. Pet. 3; Br. Opp. 14. Indeed, Petitioner specifically asked the district court to take judicial notice of that fact, arguing that absent such notice, "the jury will be weighing the fate of a man it may believe committed

aggravated sexual abuse," and the district court granted Petitioner's motion for judicial notice. Pet. 3. The government now asserts that in 1974, a person over the age of fourteen years who engaged in sexual intercourse with any person under the age of eighteen years could be convicted of the misdemeanor of contributing to the sexual delinquency of a child. Br. Opp. 14. Even so, under the law of Illinois at the time, Petitioner's conduct did not constitute the sexual abuse of a child. In 1973 and 1974, Illinois law did not recognize the crime of "aggravated sexual abuse," but did criminalize as a felony "indecent liberties with a child," defined as any act of sexual intercourse with a "child under the age of 16." 38 Ill. Rev. Stat. § 11-4 (1973). It was not until 1983 that the Illinois General Assembly passed a law criminalizing "criminal sexual abuse," and even then, that offense was defined as "an act of sexual penetration or sexual conduct with a victim who was at least 13 years of age but *under 16 years* of age when the act was committed." Ill. Pub. L. 83-1067, § 12-15 (emphasis added). Therefore, even if Petitioner's conduct amounted to "contributing to the sexual delinquency of a child," it did not constitute sexual abuse, and the photographs he took of his then-sister-in-law certainly were not so "intrinsically related to the sexual abuse of children" as to justify banning them.

2. The government also asserts that *United States v. Juvenile Male*, 590 F.3d 924 (9th Cir. 2010), *petition for cert. pending*, 78 U.S.L.W. 3483 (U.S. Feb. 9, 2009) (No. 09-940), is inapposite. This argument lacks merit. In *Juvenile Male*, the United

States Court of Appeals for the Ninth Circuit held that the application of the registration and notification provisions of the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (2006), to a juvenile who was adjudicated delinquent prior to SORNA's enactment violated the *Ex Post Facto* Clause. The Ninth Circuit was troubled by the fact that, under SORNA, "individuals who *twenty or thirty years ago* pled true to acts of juvenile delinquency — and who did so with the expectation that their adjudication would remain confidential — may, decades later, be required to publicly expose that information to friends, family, colleagues, and neighbors." 590 F.3d at 935 (emphasis in original).

If anything, this case raises even more significant *Ex Post Facto* concerns. When Petitioner took the photographs at issue, he had a constitutional right under the First Amendment to possess them. The subsequent criminalization of child pornography, and the redefinition of child pornography to encompass the pictures of Petitioner's then-sister-in-law, stripped away this right and subjected Petitioner to "public humiliation and ignominy for the first time." The government's argument that *Juvenile Male* could not have any bearing on this case represents too narrow a reading of both that case and this one. At a minimum, therefore, this Court should hold this petition pending a ruling on the *Juvenile Male* petition.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for a writ of certiorari or, at a minimum, hold it pending a ruling on the petition for a writ of certiorari in *United States v. Juvenile Male*, No. 09-940.

Respectfully submitted,

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